SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

NO. 153.

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES STINSON, HENRY J. STINSON AND MICHAEL S. BRIGHT, AS RECEIVER OF JAMES STINSON,

Appellees.

BRIEF FOR APPELLEES.

While we do not by any means concede that there is any testimony in this case from which a fraud upon the government can be inferred, yet we desire at the outset to call attention to the rule firmly settled by repeated cases in this court, in respect to the amount and character of the proof necessary to annul a patent conveying the public lands.

"The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof." *United States v. Iron Mining Co.*, 128 U. S. 673, 676.

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written

instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof." *Maxwell Land-Grant Case,* 121 U. S. 325, 381.

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish." Authorities are then cited to show that in some instances the burden of proving a negative rests upon the complaining party; and especially so where the negative allegation involves a charge of fraud against the party whose conduct is complained of, for which it is sought to defeat an estate. *Colorado Coal Co. v. United States,* 123 U. S. 307, 317; *United States v. Bell Telephone Co.,* 167 U. S. 240.

The important and conclusive case of *United States v. Budd,* 144 U. S. 154, will be noticed in another connection.

It is now almost half a century since the patents now sought to be set aside were issued. During all that time the title has rested in the defendant James Stinson, with no attempt on his part to dispose of it (except the transfer to his son, which we will discuss later); and during all which period the government has had notice that fraud or irregularity was claimed in these

entries. It was even sought to be proved on the part of the United States that there was a reputation or talk of fraud at Superior in connection with these entries; and in that connection it was shown that this talk or reputation related commonly to all the entries made in that region; including those of Judge Nelson, United States district judge for Minnesota, Senator Hunter, Mr. Cochran and others, as well as to these here in question.

Nor did counsel for the government attempt to make full or complete proof. They deliberately omitted to call as witnesses Gustav Johnson, Andrew Wallmark and Ole Westerland, three of the pre-emptors.

Meanwhile Mr. Stinson, as well as his co-defendant, Henry J. Stinson, has ceased to have any interest whatever in these lands, or the result of this suit. He has become hopelessly insolvent, and all his property is in the hands of a receiver. Innocent creditors only are interested, and if these patents are set aside they only will be injured.

Thomas Stinson, the principal defendant, in his answer to the bill denies positively and specifically every allegation thereof charging him with fraud in connection with the purchase of said lands. He there states the manner in which he became interested in western lands, as follows (R. 33): "That his father, Thomas Stinson, resided at Hamilton, in Canada, during his life-time, and was possessed of considerable property and means, and between the years 1850 and 1857 he placed in the hands of this defendant moneys to be invested in real estate in Wisconsin and Minnesota; with such moneys this defendant purchased many tracts of land in said states, acting in such purchase as the agent of his father, and taking the title thereto in his own name as a matter of convenience in the transaction of business, and for the purpose of making sale and conveyance thereof; and this defendant furnished portions of the money of his father to an agent residing at Hudson, Wisconsin, at

which place a land office of the United States was located, with directions to purchase lands from persons who might have obtained title thereto from the United States, and who desired to dispose of the same; and this defendant further says that among the land so purchased for his father, Thomas Stinson, and with the money of the said Thomas Stinson, were the fourteen quarter sections of land described in the bill of complaint, and that the purchase price of the said several tracts of land was paid for entirely with the money belonging to the said Thomas Stinson, and the deeds were taken to this defendant as trustee for his said father, and that he had no personal or pecuniary interest whatever in said quarter sections of land, or any of them, at the time of such purchase, and the making of the deeds by the several persons making entry thereof." He further states that in the year 1855 he purchased from his father two quarter sections of said land, and that in April, 1856, he executed instruments in writing declaring said trusts.

Further answering, and particularly as to the allegations of the bill respecting the alleged agreement or agreements with the said persons who made entry of the several tracts of land and the fraud charged therein, he says (R. 35): "That he was very much interested as one of the original proprietors of Superior, now known as the city of Superior, at the western end of Lake Superior, and had charge to a certain extent of the improvements made in opening and grading streets, constructing bridges, etc., at said place, and for that purpose he employed the said first John Johnson to hire laborers to work on the opening of said streets and making of such improvements for the proprietors of said Superior, and that said John Johnson did hire persons to work as laborers at said place, and among them were, as he is informed and believes, some of them named in the bill as having entered some of said fourteen quarter sections of land; and who he says, upon information and belief, went to Superior and there labored for a considerable time

under such employment; but this defendant denies that he in any way employed the said persons, or the fourteen persons named in the bill, or any of them, to enter upon any public land, or to assert any pre-emption claim thereto; and he says, upon information and belief, that each one of the said fourteen persons named in the bill as having entered said fourteen quarter sections of land did enter upon said quarter section of land subsequently entered by him and erected residences thereon and resided therein, and subsequently made claim to such lands under the pre-emption laws of the United States at the land office in Hudson, Wisconsin; and when such fourteen entries were made, and not before, that the said lands were purchased by and conveyances made to this defendant, as aforesaid. He further says that such purchases were only a portion of lands that were obtained by him, and titles taken in his name as aforesaid, with the money of his father, and conveyances made to this defendant as a trustee for him.

"This defendant, further answering the bill of complaint, says, upon information and belief, that this suit is not prosecuted for the benefit of the complainant, but for the benefit of certain private individuals who prompted the commencement of the suit, and are now prosecuting the same in the name of the United States, and with the aid of its officers, in order that they may be enabled to make entry of the said several tracts of land by the location of land script thereon, or the payment of the price fixed by the laws of congress; and he further says upon information and belief and avers, that prior to the commencement of any suit in the name of the United States against this defendant a combination and conspiracy was formed by certain persons residing at Superior, in Douglas county, Wisconsin, in connection with others residing at Saint Paul, Minnesota, and for the purpose of carrying out the said conspiracy the persons so residing in Saint Paul furnished to those living at Superior city, or in its vicinity, the sum of twenty-five thousand dollars, to be used for erecting houses upon each of said fourteen tracts of land, for the payment of lawyers' fees and other expenses necessary to set aside the title of this defendant and secure said lands to themselves; and this defendant avers upon

like information and belief, that William H. Newton, Edmund R. Otis, Robert Howenstine and others residing at said Superior city were parties to such combination and conspiracy, and that one O. W. Streeter was employed as attorney by them to prosecute suits for the recovery of said lands, and that this proceeding is the result of such arrangement."

The circuit court, after full consideration of all the evidence, dismissed the bill with a positive finding of fact recited in the decree that there was no fraud whatever with respect to the purchase of said lands by James Stinson. (R. 495.) This decree has been affirmed by the court of appeals mainly upon the ground of laches on the part of the appellant. (R. 520–523.) This question may therefore properly be considered before any argument on the facts.

I.

LACHES ON THE PART OF THE APPELLANT.

The bill of complaint filed February 25, 1895, charges fraud on the part of the appellee, James Stinson, with respect to fourteen entries of public lands therein described which were made in 1854 and 1855. (R. 1–23.) It was incumbent upon the appellant to set forth the facts excusing the delay in bringing suit. Courts of equity act upon their own inherent doctrine of discouraging for the peace of society antiquated demands and refuse to interfere when there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by the parties out of possession are productive of much hardship and injury to others and cannot be excused but by showing some actual hindrance or impediment caused by the fraud of the parties in possession which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; how he came to be so long ignorant of his rights and the means used by the defendant to fraudulently

keep him in ignorance; and how and when he first came to the knowledge alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.

The foregoing is substantially the language of this court in *Badger v. Badger,* 2 Wall. 87, 94, citing from previous decisions, and approved in *March v. Whitmore,* 21 Wall. 178, 184. The same rule has been stated in *Hume v. Beale,* 17 Wall. 326; *Sullivan v. P. & K. Ry. Co.,* 94 U. S. 806; *Richards v. McAll,* 124 U. S. 183, and in other cases cited later in this brief. This doctrine should be reasonably applied to a suit brought by the government to recover lands held for a long period of time under conveyances made in ostensible compliance with the law. *United States v. White,* 17 Sawyer, 561, 565.

In attempted compliance with this rule, the appellant in the bill of complaint after making the charges of fraud in connection with the entries of the land alleges (R. 23): "That your orators did not discover said fraud, or either or any of them, until the year 1885, when a special agent of your orators' general land office, by directions of that office, made investigation relative thereto and discovered and reported the same to your orators' said general land office." There is nothing here set forth showing why the government was so long ignorant of its rights, any impediment to an earlier prosecution of the claim or any charge against the defendant in that connection. It is submitted that this averment does not comply with the rule of the court as above stated. The bill of complaint was verified and required an answer under oath, the same not being waived. (R. 22.) The answer of James Stinson, who has held the record title of these lands ever since the purchases were made, denies specifically under oath all charges of fraud contained in the bill and after alleging that he had paid $75,000 of taxes on said lands prior to 1892, and that there is still a greater amount due

which has since been levied, and that the instant suit was instigated by outside parties, contains this averment (R. 38): "This defendant, further answering the bill of complaint, sets up as a defense and a bar to relief by the complainant the expiration of time since the sale of said several tracts of land by the United States to the several persons who made entry thereof before the commencement of this action, and avers that the commissioner of the general land office was informed of the allegations of fraud now contained in this bill in the year 1856, and that the evidence of such information has been at all times accessible to his successors in office; and this defendant insists that because of these facts a court of equity ought to remain passive, and not give any relief to the complainant in the premises." *United States v. Beale,* 127 U. S. 338, is applicable to such a situation.

The answer under oath, insofar as it is responsive to the bill, is conclusive unless overcome by satisfactory testimony of two witnesses or of one corroborated by circumstances equivalent in weight to that of another. That rule applies also to the denials of the answer to the charges of fraud contained in the bill. *Vigel v. Hopp,* 104 U. S. 441 (fraud charged); *Southern Development Co. v. Silva,* 125 U. S. 247 (fraud charged); *Morrison v. Durr,* 122 U. S. 518 (fraud charged); *Beals v. Railway Co.,* 133 U. S. 295; *Conley v. Nailor,* 118 U. S. 127; *American File Co. v. Garrett,* 110 U. S. 288, 293; *Monroe Cattle Co. v. Becker,* 147 U. S. 47, 54; *Dravo v. Fabel,* 132 U. S. 487, 489; *Union Ry. Co. v. Dull,* 124 U. S. 173.

The only proof offered by the appellant to sustain this averment excusing laches was the report of Webster Eaton to the land office, dated June 4, 1885 (R. 480, 481), and the letter of the acting secretary of the interior to the attorney general. (R. 481.) Mr. Eaton's report states that the men who made the entries were hired by James Stinson to pre-empt the lands; that none of them ever established residences on the land; that

each claim was transferred to James Stinson on the day proof was made as shown by the records of Douglas county, Wisconsin, and that James Stinson still held title to the lands. The letter of the acting secretary of the interior simply refers the matter to the attorney general so that the only excuse for the delay was found in Mr. Eaton's report, and every fact therein stated had been brought to the attention of the general land office and to the government officials as early as 1856.

The appellant offered in evidence a letter from the acting commissioner of the land office dated August 19, 1895, to the special land inspector at Duluth, Minn., stating: "The records of this office show that on December 12, 1855, Hiram Hayes transmitted five affidavits in relation to certain Hudson river cash entries," referring to the numbers which represent seven of the entries attacked in the bill of complaint. He states that a careful search has been made for these affidavits but they could not be found. (R. 478.)

There was also offered in evidence a letter from the commissioner of the general land office enclosing a letter from Hiram Hayes, dated December 22, 1856, addressed to the register at the Stillwater land office relating to the claims of John Johnson, Andrew Wallmark, Otto Wallmark and Israel Johnson, four of the parties who made the entries of land that was conveyed to James Stinson and which are attacked in this suit. (R. 478.)

There was also offered a letter from the commissioner of the general land office, dated December 2, 1899, containing a certified copy of a letter, dated October 20, 1856, signd by Thos. A. Hendricks, commissioner, and addressed to Hiram Hayes, Superior, Wisconsin (R. 479), relative to the same entries. Also a letter from Hiram Hayes to the general land office, dated January 4, 1856, relating to two of these entries and making adverse claim thereto on behalf of his clients and asking that the department would suspend the issue of patents to the two

John Johnsons, and that the validity of these pre-emptions be submitted to an investigation "since fraud cannot fail to be proved in either case." (R. 375, 376.) Also a letter of Thomas A. Hendricks, as commissioner of the general land office, to Hiram Hayes, of Superior, Wisconsin, dated May 22, 1856, relating to six pre-emption entries therein mentioned, and stating that the patents had been issued. It appears from public records that the land office had been opened at Superior, Wisconsin, in 1856, and that E. B. Dean was the register or receiver. His name is mentioned by appellant's witness Burbank. (R. 72.)

Appellees offered in evidence notices of hearing of contests in pre-emption land cases before the receiver and register of the land office at Superior, Wisconsin, on the 11th day of September, 1856, relating to the claim of John Johnson, Gustav Johanson, Israel Johnson, Ole Westerland and Andrew Wallmark, six of the persons who made the entries which are attacked in this bill. (R. 376, 377.)

Mr. Burbank, a witness called for the appellant, testified with respect to an attempted contest on his part relating to one of these entries and to his interviews with Mr. Dean, land agent at Superior. (R. 72, 73.) Mr. Gouge was also produced as a witness by the appellant with respect to an attempt on his part to pre-empt one of these tracts of land in 1855 or 1856. (R. 358, 372.) The testimony of these witnesses and the records offered in connection therewith establishes beyond controversy the fact that charges of fraud in connection with these pre-emptions were made to the general land office as early as 1855, and to the local land office then at Superior in 1856, and that the charges were made public through the notices relating to the contests and that Mr. Stinson's claim to these several tracts of land was a matter of public record in the office of register of deeds for Douglas county. There is not a single fact stated in the report of Webster Eaton that had not been brought to the attention of

the proper authorities immediately after these titles or some of them had been acquired by the appellant, James Stinson.

Other proof offered shows that the land in 1855 and 1856 was of small value, and that by reason of the development of the country and the growth of the city of Superior, their value had greatly increased, a fact which had controlling weight in prompting these contests. Testimony bearing upon this point will be referred to more fully in connection with the argument upon the facts.

Under the statutes of the United States it was then the duty of these government officials, including the surveyor, if they or any of them believed that reasonable grounds existed therefor, to have caused steps to be taken to set aside the patents to these lands. That obligation rested upon the authorities of the United States as heavily in 1856 as it did in 1885, after these lands had greatly increased in value and after the owner thereof had expended large sums of money for their protection and in the payment of taxes.

While the United States may not be held to the same strict or technical limitations with respect to laches as a private party, when it comes into court invoking equitable relief it is bound by the same rules both of evidence and procedure. If great and unreasonable delay, the death of witnesses and the presumptive loss of papers have so affected the evidence by which the right must be established, the court must dismiss the bill unless satisfied by clear and conclusive proof that the relief should be granted. Charges of fraud were made in connection with these pre-emptions soon after James Stinson had acquired title, but the appellant chose to wait until most of the witnesses were dead and the memory of the living has failed.

John Johnson who is referred to by the appellant as the agent of James Stinson and who might perhaps explain the transactions, is dead, as well as the officers of the government who were then in active charge of these matters.

The rule applicable to the government is so clearly stated by Judge Black that we quote his opinion in full:

"The lapse of time alone would determine the case in favor of Reside's estate. It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason, as well as law, that when a party to a claim has lain by until the evidence concerning it has ceased to exist, and then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved; and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh. I admit that the statute of limitations cannot be pleaded against the government as a technical bar. I do not speak of that conclusive legal presumption which will be created in six years against an individual. But the government is bound like anybody else by the rules of evidence and by the natural presumptions arising from the facts of the case. In some countries there are no statutes of limitation; in all countries there are large classes of cases to which the statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied; and such lapse of time proves that fact as fully as if it had been attested by credible witnesses. The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. *The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred.*

"There is no such impeccability ascribed to the government as will give it the right to deny the evidence. When time testifies against the sovereign, it is heard with as much respect as any other witness would be.

"This is the rule which must be applied to every stale claim, even when it seems to have been clear and free from dispute at first. But where it was originally doubtful and obscure, the presumption which time raises against it is a thousand-fold stronger; and stronger still where the obscurity was produced by the party setting up the claim."

9 Op. Attys. Gen. 204.

In *People v. Clark,* 10 Barb. 129, the New York legislature had passed an act directing the attorney-general to bring suit

to cancel certain patents granted before the revolution. The court says:

"The second ground for vacating the letters-patent alleged in the complaint is, that the lieutenant-governor, George Clarke, was interested in the grant, and that that interest was fraudulently concealed from the colonial council and the crown. A man intrusted with power by his sovereign ought not to use that power for his own advantage, and to the injury of his sovereign; and if he do, he ought to be punished. But if in this case the usual rent was reserved to the crown, and the usual condition of settlement inserted in the patent, how was the crown defrauded? The complaint makes no suggestion that the letters-patent do not contain the full rent and all reservations and conditions in favor of the king which were at that day usually inserted in letters-patent; nor does the complaint contain a suggestion that any fraud was practiced to the prejudice of the king. I deny that the judicial history of the world can furnish an example where an emperor, a king, or a republic, whether heathen or Christian, has, before this, brought a subject or citizen into court to answer for a fraud committed by some person through whom he claims title one hundred and twelve years before he was called on to answer. In the days of Methuselah witnesses might have been found to testify in relation to a fraud one hundred and twelve years after it was committed; but it would now be idle to attempt to find such witnesses. And does not the well-being of the state and the interest and security of individuals demand that even sovereigns shall not commence actions founded on transactions in relation to which no man now living is old enough to testify? The members of the colonial council and the king, from whom it is alleged that the interest of lieutenant-governor George Clarke was fraudulently concealed, have long since returned to their original dust, and no one but Him who rules in heaven can know what was or what was not concealed from them. If a claim so stale as this be contenanced by any court, no man holding under a colonial grant can have perfect confidence in his title.

"In the case of *Mayor of Hull v. Horner,* Cowper's Rep. 110, Lord Mansfield said: 'I remember in general, though I cannot recollect the particulars of it, a case in the duchy court, between the king and Mr. Brown, of Snelbrook. It was before the late *nullum tempus* bill. The evidence in support of the

title was a possession and enjoyment of one hundred years, and I held that, though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitations against the crown, yet it might operate as evidence against the crown of right in the defendant, if the claim could have a legal commencement; though such commencement could not be shown.' Even without a patent, and without a statute of limitations, Lord Mansfield held a possession of one hundred years was evidence of a right against the crown.

"If the questions in this case may be deemed to belong to a court of equity, I cannot persuade myself that they are therefore never to be put at rest by lapse of time. It would be an alarming doctrine to hold that every man in the state who holds any land under a grant before the revolution may be turned out of possession by the plaintiffs if a king was cheated who, one or two hundred years since, made the grant."

In *Clark v. Boorman,* 18 Wall. 493, Judge Miller states the rule of repose in the following vigorous language:

"Every principle of justice and fair-dealing, of the security of rights long recognized, of repose of society and the intelligent administration of justice, forbids us to enter into an inquiry into that transaction forty years after it occurred, when all the parties interested had lived and died without complaining of it, upon the suggestion of a construction of a will different from that held by the parties concerned, and acquiesced in by them through all this time."

The case of *United States v. Moore,* 12 How. 222, was a suit under a special act of congress to obtain a confirmation of a Spanish claim. In the opinion the court says:

"We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time. The party was under no disability, and slept on his rights as he now claims them, for nearly fifty years, without taking a single step. He makes no excuse for his delay, and cannot now get relief by having his title completed. No case has come within our experience where obscurity and antiquity of the transactions, more forcibly than in the present case, required a court of equity to bar a complaint on legal presumptions founded on lapse of time, and where the bar should take the place of individual belief."

The case of *United States v. Arredondo,* 6 Pet. 746, arose on a petition under a special act of congress for settling land titles in Florida, the appellee claiming under a Spanish grant. The suit was in chancery, and it was conceded that the suit must be tried between the United States and the claimant just as if it had been a suit between individuals. The court said:

"Though we should even doubt, if, sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity, according to its established rules, our rules must be in conformity with the principles of justice, which would, in a case such as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

By Mr. Justice Field, in *United States v. Flint,* 4 Sawyer, 58, the rule in question is thus stated:

"The United States by virtue of her sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibiiity of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial, or take an appeal within the same time, and in like manner, and they are equally bound to act on evidence within their reach; and when they go into a court of equity they must equally present a case by allegation and proof entitling them to equitable relief.

"Although on grounds of wise public policy no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made, the changed condition of the parties and of the property from lapse of time, the difficulty, from this cause, of meeting objections which might, perhaps, at the time have been readily explained, and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no

wrong be done to the citizen, though the government be the suitor against him.

"After the archives were arranged, and the alleged unsearchable condition ceased, nearly eighteen years elapsed before the present bill was filed, and no excuse is offered for this delay. During these eighteen years, which constitutes a period equivalent almost to a century in other countries, great changes in the condition and value of real property in the State have occurred. During this period the original claimant, who might, perhaps, have explained the alleged alteration of dates, has deceased, and third parties have acquired his interests, and, it is said, have made valuable and expensive improvements upon the property. Courts of equity will not entertain a suit to vacate a decree, even in case of palable frauds, when there has been unnecessary delay in its institution, and the rights of third parties, as in this case, have intervened in reliance upon the decree. Considerations of public policy require prompt action in such cases; and if by delay in acting innocent parties have aquired interests, the courts will turn a deaf ear to the complaining party. This is the doctrine of equity, irrespective of any statute of limitations, and is irrespective of the character of the suitor. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property."

The reasons on which this rule is based are that there is a presumption arising from the lapse of time in favor of the defendant's title and that it would be difficult to procure the witnesses who might know the facts. *People v. Clark,* 10 Barb. 120; *Maxwell v. Kennedy,* 8 How. 221; *Clark v. Boorman,* 18 Wall. 509; *Brown v. County of Buena Vista,* 95 U. S. 160; *Wilson v. Anthony,* 19 Ark. 21.

The time which must elapse to justify a court of equity in refusing to act varies in different cases, but it may be assumed that the period best approved is twenty years. *Elmendorf v. Taylor,* 10 Wheat. 173; *Sullivan v. Portland R. R. Co.,* 94 U. S. 811; *McKnight v. Taylor,* 1 How. 168; *Godden v. Kimball,* 92 U. S. 210.

In this connection attention may properly be directed to the

policy of the government upon this subject as indicated by recent legislation.

The right to maintain this suit is founded upon the provisions of the pre-emption laws of the United States, as sufficiently appears by the bill of complaint and by the brief of counsel for appellant.

Section 2263, Revised Statutes, relates to proof of settlement and assignment of claims and the last clause provides: "And any and all assignments and transfers of the rights hereby secured prior to the issuing of patents shall be null and void." These statutes were under consideration in *Myers v. Croft*, 13 Wall. 291. Mr. Justice Davis, in the opinion, says (296): "In case of false swearing the pre-emptor was subject to a prosecution for perjury, and forfeited the money he had paid for the land; and any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of *bona fide* purchasers for a valuable consideration. It is contended by the plaintiff in error that congress went further in this direction, and imposed also a restriction upon the power of alienation *after* the entry, and the last clause in the twelfth section of the act is cited to support the position." That clause is then quoted and the opinion continues: "The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. *This right was valuable and independently of the legislation of congress assignable.*"

The pre-emption laws of the United States were repealed by the act of March 3, 1891, with a special saving clause which does not preserve this right of action, and it may therefore be a question whether the general saving clause of the statute applies. (Sec. 13, R. S. U. S.)

The act of March 3, 1891, relates to timber culture lands and section 4 repeals the pre-emption laws and contains the provision: "All *bona fide* claims lawfully initiated before the passage of this act under any of said provisions of law so repealed may be perfected upon due compliance with the law in the same manner, upon the same terms and conditions and subject to the same limitations, forfeitures and contests as if this act had not been passed." It will not be contended that the right to maintain this suit is saved by the foregoing provision.

At the time these laws were repealed by the act of 1891 the appellee James Stinson, had acquired an absolute title to all the lands in question subject to the liability of forfeiture upon the grounds stated in section 2262. This is made clear by the repeated decisions of this court.

A patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. *Hoofnagle v. Anderson,* 7 Wheat. 214; *Bagnel v. Broderick,* 13 Pet. 436.

A bill in chancery brought by the United States to set aside and vacate a patent, issued under its authority, is not to be treated as a writ of error or petition for rehearing in chancery, or as if it were a mere trial before the land office. The holder of a patent from the United States cannot be called upon to prove that everything has been done that is usual in the proceedings in the land office, before its issue. Nor can he be called upon to explain every irregularity, or even impropriety in the process by which the patent was procured. *United States v. Marshall Silver Mining Co.,* 129 U. S. 579.

Mr. Justice Sawyer in *United States v. White,* 17 Fed. 561,

strongly condemns suits of this character. That was a suit to set aside a patent upon the ground that the statements in the affidavit in regard to settlement and improvement were false and fraudulent, and a demurrer to the bill was sustained. He says (564): "There is no possible pecuniary injury to complainant. The most that can be said is that a principle of public policy was violated, and thereby a moral wrong resulted by reason of the legal disqualifications, under the pre-emption act, of defendant to purchase. But the wrong was only *malum prohibitum*, not *malum per se*. . . . In view of the notorious liberality in favor of purchasers, not to say looseness, with which the pre-emption laws have, ever since their adoption, been administered all over the western states, to relax the rules referred to in the authorities cited, especially where no actual pecuniary damage or injury has resulted either to the government or private parties, and 'retry every case in which' the action of the land office, as well as 'judgments or decrees rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent,' would open a Pandora's box of evils 'far greater than any compensation arising from doing justice in individual cases.' It would open the door to any party stimulated by malice or other unworthy motive, who could, upon *ex parte* and false statements, obtain the ear of the attorney-general to promote suits in the name of the United States, to the great vexation of honest, as well as dishonest, pre-emptors, and to the great detriment of the public peace and prosperity." He adds (565): "To meet this point and as a basis for decree for forfeiture of the money as a part of the relief demanded in the bill, the United States attorney relies on section 2262, Revised Statutes," the provision of which is then quoted. "This is highly penal, and the only remedy, or rather punishment, other than an indictment for perjury, that appears to be provided by law for the wrong sought

to be redressed. But the United States has come into the wrong forum to enforce this penalty. 'It is a universal rule in equity never to enforce either a penalty or a forfeiture.' (Citing Story's Equity.) So a bill of discovery will not lie in a case which involves a penalty or forfeiture. . . . If the United States desires to enforce the penalties—the forfeiture of the money paid and the land patented—provided for in section 2262, Revised Statutes, cited, it must proceed in some appropriate mode at law, where the defendant will be entitled to a trial by a jury of the question as to giving false testimony."

The frequency of suits of this character and the evils attending such litigation and the known looseness with which the preemption laws had been administered, as referred to in this opinion, furnish sufficient grounds, if any reason was required, for the action of congress in repealing section 2262, without a clause saving rights of actions that might theretofore have accrued. Congress had the power, if it saw fit, in the repeal of the preemption laws to confirm existing titles. *United States v. Conway,* 175 U. S. 60.

A repealing statute that contains no saving clause operates as well upon pending cases as those thereafter commenced. *Given v. United States,* 184 U. S. 669, 675.

The congress has plenary power to dispose of the public lands. *Emblen v. Lincoln Land Co.,* 184 U. S. 660, 664.

The general law may grant titles as well as a special law. *Damon v. Hawaii,* 194 U. S. 154.

This is of the nature of a a suit to enforce a forfeiture and the rule which applies to such cases is well settled. *United States v. The Burdett,* 9 Pet. 682; *Chafee v. United States,* 18 Wall. 516; *United States v. Maxwell Land Co.,* 121 U. S. 325; *United States v. Budd,* 154 U. S. 144.

Section 1047, of the Revised Statutes, prescribes: "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States shall be

maintained . . . unless the same is commenced within five years from the time when the penalty or forfeiture accrued.

Adams v. Woods, 2 Cranch, 336, was an action of debt brought to recover a penalty imposed by the act prohibiting the slave trade. The statute being pleaded, a demurrer was filed to the plea and it was contended that the statute only applied to criminal proceedings. The court sustained the plea saying: "In expounding this law it deserves some consideration that if it does not limit actions of debt for penalty, those actions might in many cases be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a period of three years, it can scarcely be supposed that an individual would remain liable to a pecuniary forfeiture." This case will serve to illustrate the application which has been made of this statute.

Section 8, of the act of March 3, 1891, which repealed the preemption laws, is entitled: "An act to repeal the timber culture laws and for other purposes." (26 Statute at Large, p. 1092.) Section 8 of that act provides: "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." The reading of this statute in connection with sections immediately preceding would convey the impression that it applied only to entries under the timber culture laws, but however that may be, it indicates a purpose on the part of the government to place a reasonable limit upon suits of this character. These recent enactments reinforce the argument that the doctrine of *laches* should be applied to the disposition of this suit.

II.

ARGUMENT ON THE FACTS.

Fourteen pre-emptions are brought in question by the bill and answer in this case. Two of these made by Aaron Peterson and Martin Larson were in pursuance of settlements made August 17, 1854, final proof being made June 1, 1855. The following table shows the dates and other statistics relating to these pre-emptions:

FIRST GROUP.

Name of Pre-emptor	Time of Settlement.	Proved up.	Still Living?	Contested by	Date of Patent.	No. of Certificate.
Aaron Peterson.....	Aug. 17, 1854	June 1, 1855	No.	Lander Vevance.	May 1, 1856	2906
Martin Larson.....	Aug. 17, 1854	June 1, 1855	No.	Peter Bushman..	May 1, 1856	2907

SECOND GROUP.

John Johnson No. 1.	Sept. 27, 1854	Oct. 24, 1854	No.	Saxton Lyon....	Dec. 15, 1855	1848
Lorens Johnson*....	Sept. 28, 1854	Oct. 24, 1854	Yes.	.....	Dec. 15, 1855	1851
Sven Larson.....	Sept. 26, 1854	Oct. 24, 1854	No.	.....	Dec. 15, 1855	1850
Peter Norrell†.....	Sept. 27, 1854	Oct. 24, 1854	Yes.	.....	Dec. 15, 1855	1849
Andrew Svenson...	Sept. 28, 1854	Oct. 24, 1854	No.	.....	Dec. 16, 1855	1847
Sven Magnusson ...	Sept. 26, 1854	June 1, 1855	No.	.....	May 1, 1856	2908
John Johnson No. 2.	Sept. 26, 1854	June 22, 1855	No.	John T. Morgan.	May 2, 1859	3212

THIRD GROUP.

Gustav Johnson‡....	May 21, 1855	June 22, 1855	Yes.	A. B. Burbank ..	Mar. 25, 1863	3209
Israel Johnson*.....	June 11, 1855	June 22, 1855	Yes.	Urgelle Gouge...	May 1, 1856	3213
Andrew Wallmark‡.	June 11, 1855	June 22, 1855	Yes.	Charles Frazier..	May 1, 1856	3210
Otto Wallmark†.....	June 11, 1855	June 22, 1855	Yes.	C. H. De Graff...	May 1, 1856	3208
Ole Westerland‡.....	June 11, 1855	June 22, 1855	Yes.	Louis Rocheford.	May 1, 1856	3211

*Examined on the part of the government.
†Examined on the part of the defendants.
‡Not examined.

Argument as to the first group. There is no evidence whatever relating to the pre-emptions of Peterson and Larson who settled August 17, 1854, who may be called the first group. They are both dead. There is nothing whatever in the record to affect Mr. Stinson, we think, in any manner, as to these

entries. There seems to be nothing upon which even to base a reasonable suspicion, not even the testimony of Gibson, stated below. Even if there were evidence of fraud in one pre-emption this would not be evidence of fraud in others, even though made at the same time; much less in regard to those made at different times. *United States v. Budd,* 144 U. S. 155.

Moses S. Gibson drew some of the pre-emption papers of Peterson, but not of Martin Larson. There is absolutely nothing to connect Mr. Stinson with these entries except this fact that Gibson acted for Stinson at another time.

Argument as to the third group. The testimony as to the third group of pre-emptors who settled in May and June, 1855, and proved up June 22, 1855 most clearly shows, as we submit, that there was no fraud whatever connected with these entries. The only witness called by the government in regard to these pre-emptions was Israel Johnson, while the defendants called Otto Wallmark, and also gave testimony tending to show that Andrew Wallmark has so failed in health, strength and memory, that his testimony would not be reliable. Two others of these pre-emptors of 1855 are still living, being Gustav Johnson and Ole Westerland. Neither of these witnesses were called on behalf of the United States. Israel Johnson, the only witness called by the United States in regard to this group of pre-emptions, testified as follows (R. 90–97):

Direct examination. Q. Did you have anything to do with pre-empting some land in Douglas county, Wisconsin? A. Yes.

Q. Who first spoke to you about it? A. Pretty hard telling; I guess Mr. Stinson and John Johnson.

Q. Which Mr. Stinson? A. I don't know. I don't know the difference between them or the name of them.

Q. Well, where was it that they spoke to you about it? A. On the road between where I lived and Taylor's Falls.

Q. Where was Stinson and John Johnson? A. On the road.

Q. As to whether they were in a buggy or wagon, or something of that kind? A. In a wagon, I think.

Q. Were they together? A. Yes, they were together.

Q. What was said to you about this at that time? A. *What was said, that is so long ago I can't tell you;* they offered me so much to pre-empt land for them, that's all I can recollect.

Q. Well, do you remember what their offer was, what they said about it; tell us about it. A. If I would go up there and pre-empt land they pay me I think $30 a month, and some for my claims besides.

Q. What did you say about it? A. I say I should go.

Q. Did you go? A. I did go.

Q. Did anybody go with you? A. Yes, sir.

Q. Who were they? A. Some of them is dead. Wallmark and his brother, Swen Peterson and some other one, Gustav Vieborg and August Johnson, another fellow his name is Westlung, that's all I can recollect.

Q. Did you all go together? A. We took one claim apiece.

Q. But did you go over to Douglas county together, or did you go separately? A. We went up together and came down together.

Q. How many of you? A. I told you I can't recollect any more.

Q. Now when you got to Douglas county what did you do there about the claim? A. I didn't do anything with it.

Q. As to whether you took up a claim? A. I built a little shanty there.

Q. What claim did you take? A. I don't know; I couldn't read English, and he put my name to what he had a mind to.

Q. Who showed you what claim to take up? A. John Johnson.

Q. How did you know where to go when you went out to build your shanty? A. We had a fellow, John Johnson, to lead us, was along with us to show us the land.

Q. Who told you to go with John Johnson? A. He said we should follow him when we talked with Stinson and him on the road.

Q. What did Stinson say on the road to Johnson? What is the fact as to whether you could speak English, could you speak English then? A. No.

Q. Did Stinson speak Norwegian or Swedish? A. No, I suppose not.

Q. Johnson was Swede and he spoke English? A. Yes.

Q. And Johnson spoke Swedish, did he? A. Yes, sir.

Q. Now what was said there when they were in the buggy about you following Johnson? A. That's what I told you before.

Q. Tell it again, please. A. I can't recollect every word.

Q. Not every word, but what did he say about your doing what Johnson told you to do? A. He told me what I told you, to go up there and pre-empt land, if I go I could get so much every month and so much for my claim.

Q. You don't quite understand it. What was said about your following Johnson? A. I was to follow Johnson, I had nothing else to do with it.

Q. When you got up to Douglas county did you follow Johnson? A. I did.

Q. And what did Johnson do? A. He showed us the claim where we should work.

Q. To whom did he show these claims? A. Those along in my company.

Q. Now what did you do on the claim? A. I cleared a little piece and built a little shanty.

Q. Anything more? A. No.

Q. Did you live on the claim at all? A. Yes, a single night.

Q. And then what did you do? A. Went to another place and worked there. I don't recollect how many of us, but we worked on one claim and moved on to another one and helped each other to put up the houses.

Q. Now then what after that? A. After that I went home, right back.

Q. Did you work on the streets in Superior at all? A. No.

Q. How long were you up there altogether? A. Well, pretty hard telling, I guess it was pretty nearly a month, we went down to Hudson; we stayed at Taylor's Falls until we come back home again. I think it took us a month until we got back home on the same trip.

Q. How long did it take you to go over home from there? A. I think four days to Taylor's Falls.

Q. And the same to come back. A. Yes, sir.

Q. Well, what did you do next about this claim; did you make any papers out? A. Yes, they made out papers.

Q. Where were the papers made out? A. Hudson.

Q. Did you go to Hudson? A. Yes, sir.

Q. How long after you came back from Douglas county? A.

Not long because we stayed home one day, and went over there the next day.

Q. Who went down to Hudson? A. The whole company.

Q. The same that you have told about? A. Yes, sir.

Q. And when you got down to Hudson who did you see there? A. I couldn't tell you, because I don't know them.

Q. As to whether you saw Stinson. A. I believe he must be there, but I can't tell you.

Q. And John Johnson? A. John Johnson was with us the whole time.

Q. Now you say they made out papers for you there? A. Yes.

Q. Now who made out those papers? A. You can't find that out by me, I don't know.

Q. Did you sign any papers there? A. Yes, sir.

Q. As to whether any of the others signed papers there? A. I guess so.

Q. Now did you pay any money there? A. No.

Q. Who did pay the money to the land office? A. Somebody down there, I suppose it was Stinson that paid the money, or Johnson paid the money, I couldn't tell, because it is so long ago I can't recollect. I got some money I know, that's all.

Q. Do you know what papers you signed? A. I signed a form of a deed, but I told you I could not read English, and I don't know what I did sign.

Q. Who was the deed to? A. That fellow that hired me to go up there.

Q. Whom did the deed run to? A. I could not read a word of English.

Q. Whom did you understand it ran to, whom were you told it ran to? A. To Stinson.

Q. You understood that at the time? A. Yes, sir.

Q. Do you remember who told you that? A. No, I don't but Johnson was our man and he told us what to do.

Q. Was this the first year that you came to Minnesota? A. No, I came in the fall, in October, and this was the first year after I guess in April or May.

Q. And you came to Minnesota in 1854? A. Yes, sir.

Q. Did you take up any other land at this time? A. No, I bought of the United States my little farm what I have lived on since.

Q. That was in Minnesota? A. Yes, in Chisago county.

Q. These men that went up to Douglas county with you, what did they do on their claims? A. The same as I did.

Cross examination. Q. Had you ever seen these men that you call Stinson and Johnson before you met them on the road that day when you were going to Taylor's Falls? A. Yes, I believe so, I think I see John Johnson when I first came here.

Q. John Johnson lived in Chisago county, and he was a countryman of yours? A. Yes.

Q. Where is he now? A. Dead.

Q. How long has he been dead? A. I couldn't tell you.

Q. A long time? Yes.

Q. Twenty years? A. No, I don't think it 20 years, but I guess you will find out better than me, I don't recollect.

Q. Did you ever see John Johnson after that time when you went up there? A. Yes, I did.

Q. Had you ever seen James Stinson, this man that you call Stinson, before you met him on the road that day? A. No.

Q. Did you ever see him afterwards? A. When I was in Hudson I suppose I did, but I don't know, that was when I saw him on the road, and he told me that it was that man, and that is all I know about it; Johnson told me that it was that man.

Q. This party of men that you have mentioned were on the way to Taylor's Falls? A. I was alone when I met that man, nobody was with me, I was on my way to Taylor's Falls.

Q. *And all you know about this man is what Johnson told you at that time?* A. *Yes.*

Q. *You didn't talk with Stinson?* A. *I couldn't.*

Q. *And did Stinson talk with you?* A. *No.*

Q. *And you never talked with Stinson in your life?* A. *No.*

Q. *And he never talked with you?* A. *Not that I know of.*

Q. When you got down to Hudson some papers were made out in the office where you were, and those papers you signed? A. Yes.

Q. Whatever they were? A. Yes.

Q. The party that went with you from Taylor's Falls to Superior were Otto Wallmark, Gustav Johnson, or Vieborg, Andreas Wallmark and Ole Westerlung; was anybody else along with you from Taylor's Falls to Superior? A. I can't recollect any more; Ole Westerlung was along I know, I recollect him.

Q. There was another John Johnson, was there not, with you at Superior or at Hudson? A. No, I can't recollect any other John Johnson.

Q. Do you know any other John Johnson called John Johnson the second sometimes? A. Not in our company when I went.

Q. Your recollection is not very clear about this, is it, these transactions which happened so long ago? A. No, certainly not.

Q. And you can't be very certain what was said and done so long ago, can you? A. *Well, what was said I can't recollect, but what I done I can recollect it.*

Q. What you did you recollect? A. Yes.

Q. And you have told us all you did so far as you can recollect? A. Yes, what I can think of.

Q. And all that was said as far as you can recollect? A. Yes.

Re-direct examination. Q. Mr. Johnson, you said that you were to get so much a month, was that paid to you? A. Certainly.

Q. By whom, who paid it. A. Paid to me down in Hudson, I suppose that it came from the same man that the other did; I couldn't understand any English.

Q. It was paid to you at Hudson at the time you signed these papers? A. Yes, sir.

Q. And you didn't pay for the land? A. No.

Q. Now, Mr. Johnson, when you met John Johnson and Stinson on the road, Johnson talked to you in Swedish? A. Yes, sir.

Q. Did Johnson and Stinson talk together? A. Yes, sir.

Q. And after they had talked together did Johnson talk to you? A. Yes.

Re-cross examination. Q. How much money did you get down at Hudson do you recollect? A. No, I don't, I think I got $30 a month and so much for the pre-emption, but I don't know how much there was, I can't tell.

Q. Well, you got more than $30 down there, didn't you? A. Yes.

Q. Did you get as much as $250 do you think? A. No.

Recalled by defendants. Q. You said that John Johnson went up with you? A. I did.

Q. Do you want to correct that? A. I guess I was mistaken. I believe not.

Q. You think John Johnson was not along? A. Vieborg showed us the road and not Johnson, I think. I will take that back, if you please.

Re-direct examination. Q. Showed you the road where?

From Superior? From Taylor's Falls to Superior? A. Yes. We don't know how to go.

Q. Have you talked with anybody about that since you were on the stand? A. With Wallmark.

Q. Which Wallmark, Otto? Did he come to you? A. Yes, he comes to me and told me I was mistaken.

Q. He came to you and told you you were mistaken? A. Yes, and I believe I was. It is so long a time I cannot recollect.

Q. But John Johnson was in Superior while you were there, was he not? A. I believe not. He was in Taylor's Falls when we left there.

Q. Did you not see him in Superior? A. I can't recollect, but I am pretty sure I was mistaken.

Q. Didn't you see him in Superior at all while you were there? A. I don't think so. It is a long time, but Wallmark said he was not there and when he don't know I don't know.

Q. So you were depending on Wallmark's statement? A. Just what he told me.

Q. You rely upon what Wallmark tells you? A. Yes, I believe what Wallmark tells me.

Q. How long do you say you were in Superior, now? A. Well, I said it was nearly a month from the time we left Taylor's Falls until we got home again.

Q. Now, do you say, Mr. Johnson, that you did not see John Johnson there? A. I saw him in Hudson.

Q. Did you say you did not see him in Superior? A. I do say so, but I am not sure.

Q. Who else have you talked to besides Otto Wallmark about this? A. Nobody else here was along with me—in my crowd when we was up there.

Q. Who have you talked with besides Wallmark since you were on the stand before? A. No one.

Q. Who else have you talked with besides Wallmark about this? A. Nobody else here was along with me—in my crowd when we was up there.

Q. I think you said he came to you and said that you were mistaken? A. He did that out in the hall.

Q. Who else was there? A. He talked to me and he said I was mistaken in my witness and so we talked that matter over.

Q. Who was there when you talked the matter over out in the hall? A. Gustav Johnson was there.

Q. And who else? A. Nobody else.

Q. This gentleman here? A. No.

Q. This gentleman here (Mr. Stewart, of Chicago, Ill.)? A. No.

Q. Or Mr. Bashford or Mr. Sanborn? A. No.

Q. What makes you think you were mistaken about John Johnson having been in Superior? A. Because I was not certain and when he said he was not there when he was there, then I think I must be mistaken, because Wallmark and I was there the whole time.

Q. You think you are mistaken then because Wallmark says you are? Is that it? Is that right, Mr. Johnson? You think you are mistaken because Wallmark said so? A. Yes. That is the reason because I can't exactly tell myself if he was along or not along.

The above is substantially all the testimony of Israel Johnson.

The defendants took the deposition of Otto Wallmark in regard to this same group of pre-emptions. (R. 206–234.) Mr. Wallmark has held various public offices in his county, and was State Senator for two sessions of the legislature of Minnesota, and county auditor for Chisago county for twenty years. He was a delegate to the National Republican Convention of 1872. (R. 208.)

A witness called by the United States, Judge Shaleen, testified that Andrew and Otto Wallmark are men of the highest standard of character, character above reproach, and that Andrew Wallmark was out of health and was so old that his memory was somewhat impaired. (R. 352.) Otto Wallmark testified positively that he made his pre-emption for his own benefit, paid his own money for the pre-emption; the money was not furnished him by Mr. Stinson or anybody else; had no negotiations with Stinson, or any one representing him for the purchase of land for him or the sale to him, prior to proving up. He further stated that the other men went up with him, and that he never heard any of them mention that they were going to sell their pre-emptions; that to his knowledge there was no understanding between any of them for the sale

of their land to Stinson or to anyone else prior to the time of their proving up to land in Hudson; that they never uttered a word about selling or anything of the kind; the pre-emptors were all together daily, both coming up and going down during the time they were on the land. He was not solicited by any one to go there and enter land, nor did he act under the direction of any person in doing so. (R. 214.)

In addition to this situation of the testimony, the bill requires the defendant to answer under oath. He did so, fully meeting all the charges of fraud with a full and explicit denial. The weight to be given to the answer as evidence has already been stated and the authorities cited.

In *Slessinger v. Buckingham,* 8 Sawyer, 469, 17 Fed. Rep. 454, Judge Sawyer calls attention to the weighty burden under which a complainant labors when, instead of waiving an answer under oath, he calls upon defendant to furnish evidence in the case, in a sworn answer. He points out that when examined orally as a witness *defendant counts only one;* but when his evidence is called for under oath in the answer, *he counts two.*

Not only does the defendant James Stinson answer fully, clearly and explicitly denying all charges of fraud, but he denies them with equal explicitness in his oral testimony, taken by complainants. (R. 186 *et seq.*)

The only testimony which can possibly support the bill in any way is that of Israel Johnson to the effect that John Johnson told him in the Swedish language, which Stinson could not understand, that "they" wanted him to go up to Superior to pre-empt land for them, and being asked leading questions, he further stated that Johnson and Stinson talked together and after that Johnson talked to him. As we shall see further the testimony necessary to set aside a patent must be clear, unequivocal, and convincing, and this cannot be done upon a bare preponderance of evidence, leaving the issue in doubt. There must be

full proofs, clear, convincing and unambiguous. Nor would the testimony of Israel Johnson affect the entry of any other person. Such testimony, even if sufficient to set aside the Johnson pre-emption, would simply cast a mere suspicion upon the other entries in the same group. In such case proof that one entry was unlawful would not be full, clear and convincing proof necessary to affect the others. *United States v. Budd,* 144 U. S. 155.

In regard to the third group, therefore, we think the explicit denial of Mr. Stinson equivalent to two witnesses. We have the positive testimony of Otto Wallmark in our favor, we have the fact that the government did not call Gustav Johnson, Andrew Wallmark or Ole Westerland, as against the testimony of Israel Johnson, professedly confined to his own case, with the express statement that it is so long ago that he can't tell what was said. It is submitted that a weaker case to set aside a patent which has stood more than forty years can hardly be conceived.

The testimony of Mr. Gibson, hereafter stated, shows that he drew some of the pre-emption papers of three of the six belonging to this group. He cannot remember how he came to do so, or anything clearly relating to the transaction. He says he drew the original affidavit of Otto Wallmark, who testifies positively that there was no agreement whatever with Mr. Stinson. He also drew the original affidavit of Peter Norrell, who testifies with equal positiveness that there was no such agreement.

Argument as to the second group. The second group of pre-emptors made their settlements in the latter part of September, 1854, and proved up October 24, 1854. They were five in number. Of these five, three are dead and two are alive. Both of the living pre-emptors were examined, Lorens Johnson on behalf of the government and Peter Norrell on behalf of the defendants. Lorens Johnson was also examined in the year 1895 in an action brought by the widow and heir of another of the pre-emptors, being Andrew Swenson or Andrew Ogren, as he

was sometimes called. In the testimony taken in the Ogren case, Mr. Johnson testified substantially as follows: "I did not enter on the land to sell it on speculation but to devote it to my own use. I had not made any agreement or contract by which the title I might acquire should inure for the benefit of any other person. I had made no contract or bargain to sell to any person, nor for any person, the land nor any part of it. I had not at any time made, and did not make any agreement or understanding with James Stinson or any other person, that the entry was for his benefit or of any other person, except myself." (R. 699.)

Lorens Johnson was examined in this suit in 1898 on the part of the government, and testified substantially as follows (R. 98 *et seq.*).

Q. Did you do anything about taking up any land in Douglas county, Wisconsin? A. Yes, sir.

Q. Who first spoke to you about it? A. John Johnson, I guess.

Q. Where? A. At Taylor's Falls.

Q. Was anybody with him?

John A. Larson, sworn as Swede interpreter.

Q. Was anybody with John Johnson when he spoke to you about taking up this land? A. No.

Q. What did John Johnson say? A. He didn't say nothing except he wanted me to go to work by the month—$30.00 a month's wages.

Q. Where did he want you to work? A. Up at Superior.

Q. For how much a month did you say? A. $30.00 a month.

Q. What did he say about taking up the land? A. He didn't say anything particular about that, but we should take one hundred and sixty acres each.

Q. Whom do you mean by he? A. Stinson.

Q. What Stinson? A. James Stinson.

Q. Did you see James Stinson? A. Yes. He was there.

Q. Where? A. In Superior.

Q. And what did Stinson say to you? A. (By Interpreter—He says he didn't understand what Stinson says. It was only Johnson that talked to him about it.)

Q. Were Stinson and Johnson together? A. Johnson was hired just like me from Stinson.

Q. How do you know that? A. He said so himself.

Q. Who said so? Do you know that Johnson was hired by Stinson? A. He hired him just the same as the rest.

Q. How do you know that? A. I was at Taylor's Falls when he hire him.

Q. Were Stinson and Johnson together when these men were hired at Taylor's Falls? A. Yes, sir.

Q. Now you didn't speak English then did you? A. No.

Q. Did Stinson speak to Johnson? A. Yes.

Q. And then did Johnson speak to you in Swedish? A. Yes.

Q. When Johnson spoke to you in Swedish he hired you at $30.00 a month? A. Yes.

Q. Now who went over to Superior with you? A. It was an Indian that went with me.

Q. You remember the time in Taylor's Falls when you were hired? A. I think it was in '54.

Q. Now when you were there in Taylor's Falls was anything said to you about doing what John Johnson told you to do? A. I did not know what they were going to do until I was hired to go to Superior.

Q. Who was to tell you what to do? A. Did not know that before we got there.

Q. When you got there did you find it out? A. Yes.

Q. What did you find out then? A. Went to work to lay out the streets.

Q. Who told you where to go on the land? A. John Johnson.

Q. What did you do on the land? A. We built cabins—shanties.

Q. How much land did you settle on? A. One hundred and sixty acres.

Q. What kind of a cabin was it? A. It was made of chunks, six feet long. It was just a little shanty.

Q. Any roof on it? A. They put on brush for roof.

Q. Did you live in that shanty? A. No.

Q. How long were you building it? A. About two or three hours.

Q. Now these other men that went over there with you, did they have claims like yours? A. Yes, same thing.

Q. How many acres did they lay claim to? A. I don't know

anything about that, but I suppose they took one hundred and sixty.

Q. Did they use their shanties? A. We helped each other to build shanties—shanties all alike. We were not particular about it.

Q. How long did you stay in Superior? A. Two months.

Q. Were you paid for your time over there? A. I was not paid until I came to Taylor's Falls.

Q. Were you paid when you came to Taylor's Falls. A. Yes.

Q. How much? A. Thirty dollars a month and was for two months.

Q. What did you do in Superior when you were there? A. They built a pile driver on the lake there and then cleared the streets.

Q. Did you see Stinson over there. A. Yes, he was there all the time. He went with us down to Superior.

Q. Went with you from Taylor's Falls to Superior? A. No.

Q. What do you mean, that Stinson went to Superior with you? A. He said when he left us that we should meet him in Hudson ten days after.

Q. Where did you leave Stinson? A. In Taylor's Falls.

Q. Then did Stinson come down from Superior to Taylor's Falls with you? A. Yes, we were all together.

Q. John Johnson too? A. Yes.

Q. Who told you to meet Stinson in Hudson ten days afterwards? A. He said that himself.

Q. Well now, where did you go from Taylor's Falls? A. I went to Chisago Lake.

Q. Did you go to Hudson? A. Yes.

Q. In about ten days? A. Yes, just ten days.

Q. Who went down to Hudson with you? A. All of them that was up there.

Q. Who were they? A. Some of them dead that went up with us at the time.

Q. Yes, I know, but tell the names? A. John Johnson, Peter Norrell, Peter Magnus, one by the name of Alstrom. They are dead so I forgot the names of them.

Q. How many were there together? A. I think there was just about fourteen.

Q. Now when you got down to Hudson did you see Stinson there? A. Yes, he met us there.

Q. Now what did you do at Hudson? A. I was at the land office and signed the deeds.

Q. Who was there with you? A. Stinson.

Q. Now did you get any money there? A. Yes, I got ten dollars when I went to Hudson.

Q. Who paid that money? A. Stinson.

Q. Stinson himself? A. Yes.

Q. Were you all together when it was paid? A. I can't recollect.

Q. Did you see it paid to some of them? A. I can't recollect that but I know that he paid me.

Q. Did you see him pay anybody else? A. No.

Q. Who made out the papers? A. I don't know.

Q. Did you pay any money to the land office? A. No.

Q. Who paid the money to the land office for you? A. I don't know, I didn't see anybody.

Q. Whom did you understand paid the money to the land office? A. I don't know.

Q. Do you remember the description of the land which you entered? A. No.

Q. Well, you did not enter any land there except once did you? A. No.

It is conceded by the counsel for the defendants that the description of the land entered by or in the name of Lorens Johnson was the Northwest quarter (N. W. ¼) of Section 33, Township 49 north, Range 14 west, Douglas county, Wisconsin.

Q. In Superior, were these men that went down there with you working on the streets and on the pile driver at the time you were? A. All of them. They had their own camp and lived in it. All together.

Q. How long did you stay on your claim up there? A. I was there when I built the camp and it took me about a couple of hours.

Q. The others the same way? A. Yes.

Q. Did he pay you at Hudson the thirty dollars a month? A. He paid me at Taylor's Falls before we went to Hudson.

Q. Stinson? A. Stinson himself paid me.

Q. Was this John Johnson who filed a claim a married man? A. No.

Q. Was there a John Johnson who filed a claim a married man? A. There was a man by the name of Hellene (Helleen) that they may have called Johnson, but I could not say for certain. This man Helleen was a married man.

Q. Where was your family living? A. Chisago Lake. Ogren

was also a married man. His family lived at the same place that I lived, Chisago Lake.

Q. Why did you go out on that claim near Superior? Who told you to go out? A. Mr. Stinson.

Q. Did Stinson go out on the land with you? A. Yes.

Q. Anybody else? A. The whole crew.

Cross-examination. On the cross-examination the witness testified that no one but Johnson talked to him about taking land. Stinson and Johnson went with him on the land. Did not stay a night in the shanty. It is pretty hard to recollect so long ago whether he slept in the shanty or not. Did not testify in the Ogren case that he did not enter the land to sell on speculation but for his own use. Did not enter it to sell on speculation.

Q. What did you take land for? A. For a month's wages. Did not testify that I had not made any contract or agreement by which the title was to inure to any other person, nor that I had no contract or agreement not to sell to any other person. *Did not have any bargain with Stinson to sell the land to him before I made the entry.* Did what Johnson told me. I did not pay for the entry, and don't know who did.

Evidence of Peter Norrell. On the part of the appellees the testimony of Peter Norrell, the only other pre-emptor now living in the second group was taken. Mr. Norrell testified that he went up to Superior about the middle of August, 1854. The record shows that he made a settlement September 27, 1854. He says he built a shanty, cut some brush, and built a little kind of a fence, and planted a few beans. He slept in the shanty and made a door and a smoke hole, and cooked, ate and slept in there. (R. 242, 243.) That he first saw Stinson at Superior but did not see him until after he had been on his claim and made his shanty. Stinson went down with the party from Superior to Taylor's Falls. That he was told that they were going to pay the money afterwards, and he did just the same as the others as he could not understand any English. He did not sell the land to anybody, nor take it up for anybody else except him-

self. "Just what I done it for was my own use." Did not have any agreement with Stinson nor anybody that he should take up the land for him or anybody else at any time. (R. 246, 247.) On cross-examination he stated that ten or twelve years before, a man by the name of Streeter called to see him, after he had learned to speak English. The date of this interview, as shown by the affidavit of Peter Norrell, was November 14, 1887. (R. 355.) He testified that Streeter told him he was going to help him get back the land. They went before Mr. Shaleen, clerk of the court, and he signed and swore to a paper before him. The paper being produced the witness identified his signature, and further testified that Streeter did not read it right to him; that he jumped across the lines where it says "I got my own shanty there, then he jumped across, he jumped over that." Witness told Shaleen to read it over and Streeter took it and looked around and said "Oh, that is all right" and Streeter said he wanted to help us get the land back. "And about three or four weeks afterwards, I see myself in the newspaper, he put it into the newspaper, and it say there them fellows went up there to Superior and enter that land, pre-empted land, about forty years ago, so long ago,—they going to go up there, they got the right to go up there now and build a shanty, and they own the land. That is what I see in the paper, a Swede paper, my paper. He had it put in there." Streeter further told him that Stinson got it "and now he is going to get it from Stinson, and let us have it back." He did not say anything only, "I am going to help you get the land back, it was all a swindle that Stinson done." (R. 268–271.)

The evidence of Moses S. Gibson relates more particularly to this second group of pre-emptions, and is therefore stated at this point. It is in substance as follows:

The testimony of M. S. Gibson. At the time his testimony was taken Mr. Gibson was 76 years of age, and had had sickness which affected his memory. He stated that it was very difficult

to recollect the matters about which he was questioned. He could not remember whether he talked with the Swedes whose affidavits he made out, nor whether there was an interpreter present. (R. 54, 55.) He can't recall whether he talked with Mr. Stinson about the matter. (R. 55.) The only thing he could recollect was that in the fall of 1854 he was requested by Mr. Stinson, after he had started across the St. Croix lake, to return with him to Hudson to make out some papers, and that he did so and was paid $20 for it by Stinson. He also states that many of the papers in the three groups of October 24, 1854, June 1, 1855, and June 22, 1855, are in his handwriting, although some of them were written by others. (R. 46–54.) It also appears that Mr. Gibson was a business partner of Mr. Henning, the register of the land office in the banking business, and did business in the same building, and on the same floor, as the land office. Also that a large number of entries were made in those days, and the work of making out the papers was quite laborious. (R. 52.) While he thinks he did not make out preemption papers unless requested by some one outside the office, yet he says that he don't know about it, and could not recollect these if he had not seen them. (R. 50, 51.) He was the only person in that locality who could take acknowledgement of deeds. (R. 53.) He cannot remember, but can only give impressions. (R. 54.)

Mr. Gibson, on cross-examination, corroborates the testimony of Mr. Stinson and other of appellees' witnesses that there was no understanding or agreement for the sale of the lands prior to the acquisition of title by the entry men. He says (R. 55):

"Q. You said that Mr. Stinson seemed to be doing something about directing or controlling these men. Just state what you can recollect clearly as to what you saw him do. A. After they had made their proof, and got their duplicate receipts, I saw him talking with them by themselves.

Q. After that? A. After they got the duplicate receipts.

Q. You did not see him talking with them before that? A. No.

Q. That is all you saw which led you to think he had anything to do with them? A. That is what made the impression on my mind.

Q. That is all you saw? A. Yes; I didn't see anything else except seeing him in conversation with them.

Q. That was after these papers had been made out, that you speak of? A. After the duplicate receipts had been given to them.

Q. You have had some sickness that affected your head in some way? A. Somewhat, sir. It affected my memory to some extent. It was an abcess. I took cold at the time of Harrison's inauguration."

This testimony was given forty-two years after the transactions, by a man 76 years of age, whose memory was impaired by sickness, and who says it is very difficult to recollect anything. Is this evidence clear, unequivocal and convincing, sufficient to set aside patents which have stood nearly half a century? Suppose everything Gibson says impeaching the transaction be accurate and true, what does it amount to? Assume he was hired to do some business for Stinson in 1854. He did make out five deeds for Stinson October 24, 1854. In this there is nothing even suggesting anything wrong. He does not say he was hired by Stinson to make out pre-emption papers, but suppose he had been? These questions are all answered by the case of *United States v. Budd,* 144 U. S. 155. That was a case to set aside a patent of timberlands, and was brought against Budd and Montgomery. It appeared in proof that Montgomery had purchased about 10,000 acres of timberlands in the same locality, and that the names of the witnesses in each case were the same. Deeds were taken by Montgomery within a few days after the payment to the government, and these deeds showed only nominal consideration. The land was very valuable, the tract in question being worth $5,000. Neither Budd nor Montgomery took the witness stand. Budd stated that he did not know that he had ever seen the land. Long after his conveyance

to Montgomery, he stated that he had not sold it, but still held it, and that the land was "in soak." It was also shown that in two other cases relating to two other tracts of land, Montgomery promised to give the entryman $100 to $125, besides expenses, if they would take up timber claims for him in that vicinity. The court say (144 U. S. 162–165):

"The particular charge is that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should enure to the benefit of such co-defendant. Upon this question the fact that stands out prominently is that there is no direct testimony that Budd made any agreement with Montgomery, or even that they ever met, or either knew of the existence of the other, until after Budd had fully paid for the land. No witness ever knew or heard of any agreement. What, then, is the evidence upon which the government relies? It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, and in two instances a day or two before such payment; that these various deeds recite only a nominal consideration of $1; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his conveyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was "in soak." But surely this amounts to little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate and implies or suggests no wrong. This act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power or alieniation. *All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim*

upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally or to individuals a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase. Nor is this a case in which one particular tract was the special object of desire, and in which, therefore, it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tippery, upon which some reliance is placed by the government, which was that Montgomery offered him $100 besides all his expenses if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell to him. The government relies also on the testimony of Edward J. Searls, that Montgomery promised to give him $125 and all costs and expenses, if he would enter a tract of timber land and convey to him, and that thereafter Montgomery advanced the money for the payment to the government, and subsequently, on receipt of a deed, paid him the $125. If it be conceded that this testimony as to another transaction be competent in this case, and there be put upon the testimony the worst possible construction against Montgomery, to the effect that he made a distinct and positive agreement with Searls for the purchase of a tract which the latter was to enter and obtain from the government, and so a transaction within the exact denunciation of the statute, still that testimony only casts a suspicion on the transaction in question here, and suggests the possibility of wrong in it. Because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has

done like wrong at other times and in other transactions. Suppose in each of the twenty-one cases specified in the testimony the government had filed a separate bill making the patentee and Montgomery parties defendant, and charging in each, as here, *a prior unlawful agreement*, and in twenty of them the patentees and Montgomery had each answered, denying under oath any prior agreement, while in the twenty-first they had likewise answered, admitting in full as charged the making of such an unlawful agreement; would the admission in the case be adjudged, in the face of the denial under oath in the other twenty, clear, full and convincing proof that in those cases likewise there was a prior unlawful agreement? And yet such admission of both patentee and Montgomery would be stronger and more satisfactory evidence than the separate testimony of the patentee. And this is all the testimony which in any manner points to wrong in this transaction. Surely this does not come up to the rule so well established as to the necessary proof in a case like this."

To same effect is the case of *Colorado Coal Co. v. United States*, 123 U. S. 307.

Mr. Stinson testified that the men who made these entries or some of them, were employed by him through John Johnson for the Town Site Co., but he was not able to state when or how they were paid or the amount paid to each, or the money transactions with them or with John Johnson or with Mr. Gibson or the Town Site Co., for the reason that his books were destroyed in the Chicago fire. (R. 170.) He cannot state who negotiated the purchase of the claims of these men, whether himself, Gibson or Johnson, but he swears positively that he had no understanding with any of them for the purchase of the land before final proofs had been made at Hudson; that the subject was never mentioned at all; that he is sure none of the purchase price was advanced to any of them before proof had been made; that he had never made any arrangements with them himself and had never authorized Johnson or Gibson to make any arrangements with them before such proofs had been filed, and that he never authorized Johnson or Gibson to advance any money to them before that time. "Q. Did you ever have any

arrangement or understanding with those men at any time for the purchase of their claims before they had made proofs of their claims at Hudson? A. I know there never was any arrangement to my knowledge. Q. Had you learned before you went to Hudson in 1854 to settle with these men that they desired to sell their claims, which they might obtain from the government? A. I had not learned." (R. 189.) "Q. In respect to the claims you bought in 1855 I will ask you whether or not you had any understanding with any of those men before they had proved up their claims, with respect to the purchase of those claims. A. With none of them. There never was any understanding about purchasing until the entry was made. Q. Had you before the entry was made furnished any money yourself personally to these men to make payment to the government? A. I had not." He says that before these entries were made he had no agreement or understanding with respect to the purchase of these claims and that no money was advanced in expectation or in anticipation of their purchase by him, and that he had not authorized any such advances to be made. "Q. But in respect to all these transactions and in respect to each of them I understand you to say that you had no understanding or agreement for the purchase of the claims before the claims were proved up? A. Most decidedly not. There was never any understanding before the entry was made." (R. 189.)

III.

THE ENTRIES IN QUESTION ARE WITHIN THE TRUE INTENT AND SPIRIT OF THE PRE-EMPTION LAW OF 1841. THE EVIDENCE SHOWS THAT NO FRAUD WAS COMMITTED.

Not only is the evidence of fraud exceedingly weak, as we submit, but the true spirit and purpose of the pre-emption law was in no manner violated or defeated. The United States received the lawful price for the land. Four of the entries were proved up eleven days after settlement on the land. It took six

days to travel from Superior to Hudson, leaving only five days for settlement, improvement and cultivation. To say that the officers of the United States were deceived as to the nature of the improvements and habitations requires a considerable stretch of the imagination. What kind of a dwelling-house can be erected in five days?

But we insist that the settlement and improvement were sufficient to satisfy the policy of the law, when applied to lands unfit for cultivation or homes, as these lands were, and that this is the true construction of the pre-emption law.

It is claimed by counsel that the policy of the pre-emption law is to procure a home for the settler. We take issue squarely with this proposition, and say that the policy of the pre-emption law, especially as interpreted in 1854–1855, was to prevent speculation, and apply the land to the exclusive use of the settler, either as a home, or in some other way. There are some loose expressions in the books to the effect that the policy of the pre-emption laws was to make a permanent home for the settler, but they are not supported by the history of the legislation or the decisions of the courts. The language of the pre-emption law does not justify any such construction. It is as follows:

"Every person . . . who shall hereafter *make settlement in person* . . . and who shall *inhabit* and *improve* the same and who has or shall erect a dwelling thereon, . . . shall be authorized to enter."

"He or she shall make oath . . . that he or she has not settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to his or her own exclusive use and benefit," and has not made any agreement, etc.

Pre-emption act of September 4, 1841, secs. 10, 13.

There is nothing here requiring either personal residence or any definite term of inhabitancy, and such was the interpretation given by the attorney-general of the United States. Two opinions were given at the request of the secretary of the treas-

ury upon the proper construction of the pre-emption act of June 19, 1834, providing that—

"Every *settler* or *occupant* of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1833, shall be entitled" to pre-emption. 4 U. S. Stat. 678.

The attorney-general gave it as his opinion, for the guidance of the officers of the United States, that actual residence on the land was not indispensable. 3 Op. 182, 309. The only substantial difference between the acts of 1834 and 1841 is that by the latter the claimant is required to erect a dwelling. There is nothing whatever in either act which requires the claimant to establish his residence on the land for any definite time, or to make his home in a tamarack swamp, bog or marsh, but he must settle, improve and build a house, and must *inhabit* the tract, that is, go upon it, but not for any length of time. Congress must be supposed to have understood that vast tracts of the public lands, like the tamarack swamps at Superior, and the marshes upon which the city of Chicago was built, were absolutely unsuited for homes, or permanent residence. But such lands because of their situation on great rivers or lakes might attract people, who might settle upon them with a view to their purchase; and it was to protect such settlers against men who could outbid them that the pre-emption act was passed.

A moment's glance at the history of pre-emption will show that the object of the pre-emption laws was to prevent speculation, and secure the land to the exclusive use of the settlers, but not to compel them to make homes in bogs, swamps or marshes. The plan of disposing of the public lands was this: After survey the president's proclamation offered either all or a part of the public lands in any land district for sale at public auction to the highest bidder. The sale remained open for two weeks only. After this all the lands so offered were open to private cash entry until they were all sold. If any particular locality

had attracted squatters or settlers, whether it was suited for agriculture or was thought to be valuable because of its location on some navigable river or lake (though perhaps unfit for cultivation or permanent residence), such locality would be excepted from the proclamation offering lands for sale at auction. The lands so reserved from public sale were then known as "unoffered" lands, subject only to pre-emption, and those so put up as "offered" lands. When the demand for such unoffered lands had become satisfied by pre-emption sales, the balance of the lands not included in the proclamation were then offered at public sale, and after the two weeks' period became subject to cash entry. This statement of the practice is substantially shown in the Revised Statutes, secs. 2353–2366.

Leaving out of view railroad grants, private grants, timber and stone entries, mining entries and scrip locations, three systems of disposing of the public lands have been in use, (1) by public cash sale, followed by private cash entry, (2) pre-emption entry, and (3) homestead entry. The cash entry system was in practice from the beginning of the government until 1891, the pre-emption system from 1841 to 1891, and the homestead system from 1862 to the present. The object of the cash system was to *dispose of* the public lands, of the pre-emption system to protect settlers from speculators and secure the lands to their *exclusive use,* and of the homestead settlers, as Mr. Seward said in the senate of the United States: "To secure *homes* for the landless freemen of the United States." The primary object of the pre-emption law was not to secure homes for the claimants, but to protect squatters, pioneers, and first settlers against the power of men who had money.

The great body of the public lands, outside of land grants and mineral lands, have been sold at cash entry. The pre-emption law has been of very limited application, being generally confined to the sites of future cities, to a great extent unfit for agriculture. No greater perversion of its true spirit and purpose

would have been possible than to compel the making of a permanent home on the land. The interest of the pioneer or first settler, and his protection from the power of money and speculation, by securing the land to his own exclusive use, *either by residence or sale*, was the great purpose of the law.

The history of the pre-emption laws thus shows clearly what their object and purpose were. Prior to the act of September 4, 1841, under which these entries were made, no general pre-emption law had been adopted. A number of special acts had been passed, all retrospective in their nature, for the benefit of squatters or pioneers who had settled in certain localities before the land was surveyed. There being no pre-emption law, no act securing to them the benefit of their prior occupation, as soon as the land was put up at auction other persons would outbid them, and secure the land they had settled upon, and whose value they had enhanced. Special acts were therefore passed by congress giving such settlers pre-emption rights, but such acts were limited to the past, and were in no way prospective.

It was found, also, in the administration of these acts, that speculators, in anticipation of their passage, would procure persons to occupy valuable lands for their benefit, agreeing to convey to them, pay them for their occupation, and as soon as they made final proof would take conveyances from them. In order to prevent such speculation, and at the same time to cut off the opportunity for persons to outbid actual settlers at auction sales ordered by the president, and to secure the land to the *exclusive use* of the pre-emptor, the act of 1841 was passed.

Myers v. Croft, 13 Wall. 291.

The following special pre-emption acts were passed prior to 1841:

March 25, 1816. 3 Stat. 260.
March 3, 1817. 3 Stat. 393.
April 20, 1818. 3 Stat. 450.

May 29, 1830. 4 Stat. 420.
March 2, 1833. 4 Stat. 663.
June 19, 1834. 4 Stat. 678.
June 22, 1838. 5 Stat. 251.
June 1, 1840. 5 Stat. 382.

These considerations show why the president did not order by proclamation that these lands at Superior should be "offered," that is, put up for sale at auction for a limited time, and then offered for cash at private entry. The lands in the vicinity of Superior had attracted numerous settlers who thought that this point was destined to be a large city. Judge Nelson describes in his testimony the town-site company, composed of himself, Col. Robertson, D. A. J. Baker, James Stinson, Granger, Senator Hunter, of Virginia, Cochran, of Washington, Nettleton, Newton, Thompson, Edmund Rice, Cass, Walker, George L. Becker and others. (R. 464, 465.) Many other persons were desirous of entering lands there, and claims were made as fast as the survey was completed. Testimony of Stuntz, 129. Therefore, in order to protect the rights of prior settlers, and enable them to devote the land to their own exclusive use and benefit, these lands were allowed to remain as "unoffered lands," subject only to pre-emption.

But the lands in question were from two and a half to five miles from the town-site, or settled part of the locality. (R. 370.) They were good for nothing for argriculture, and the same is true to-day. Hence, the only possible use they could be put to from the standpoint of the pre-emptor was to sell them, at a price in advance of that paid. Suppose one of these claims had been suited for an addition to Superior city or village, and could have been sold for that purpose at a considerable advance over the government price. Obviously, this might have been the very best use to which it could be devoted. Thus, the spirit and true purpose of the pre-emption laws were fully subserved by the sale of these lands to Stinson. No one was defrauded. He

held the lands more than forty years, paying taxes on them amounting to $72,848.47. (R. 277–291.) The lands were thus placed in the precise situation and condition they were designed to be, that of becoming a portion of the domain of the state, and bearing their share of the public burdens, ready for improvement and sale when the proper time should arrive. Neither the government nor the pre-emptors were injured in the slightest degree. The latter received its price, and the former all the benefit possible. To say that a fraud was committed under these circumstances is a monstrous exaggeration.

Secretary Teller, in his circular of 1883, speaking of frauds under the land laws, says that persons securing lands by fraud on the government rarely hold them long, because it is desired to place them in the hands of innocent grantees, against whom the fraud cannot be urged. 4 Pub. Dom. 537. But here Mr. Stinson did not act as if he had committed a fraud. He held the lands and paid his taxes, year after year, until this attack was worked up by an interested adventurer. It is respectfully submitted that the record shows not the slightest proof of any fraud, but rather transactions beneficial to all concerned.

It is argued that there was a speculation in these lands because, it is said, they were worth more than Stinson paid for them, but of this there is not the slightest evidence. The testimony of James Bardon is cited to sustain this point. He did not go to Superior until July, 1857, nearly three years after the first pre-emptions were made. He does not pretend to set a value on them until 1857, and then only in a general way. (R. 273.)

The pre-emptors obtained the full benefit of their claims.—The evidence clearly shows two things: (1) the absence of any agreement by any of the pre-emptors to sell his pre-emption right, and (2) that each one obtained the full benefit of his pre-emption. The act of 1841 required an affidavit that the claimant had not "settled upon and improved said land to sell the

same on speculation, *but in good faith to appropriate it to his or her own exclusive use or benefit.*" Mr. Gougé, witness for complainants, testifies that the country in which these pre-emptions were made was "very thick tamarack woods," very wet, and it was the same all through there, no drainage (except near the creek and river), and no roads. He says he lived on one of the claims for some years and used up the money he had. "Where the people lived on their claim they could not make a living on them." The climate is cold, wet and stormy, and the soil red clay. "They would live on the claim a year or so, and then go off. When they prove up they go off." (R. 365, 366, 369, 372.)

The court will take notice of the fact that the whole country from Green Bay to St. Paul was in 1854 and 1855 an almost impenetrable wilderness. The only settlements north of St. Paul were at Taylor's Falls and Superior, and these were small and unimportant. Even if this land had been suitable for agriculture, yet there were no railroads and little traffic on the lakes. The lands were utterly unsuited for places of abode. Even now there is little agriculture in that part of the state.

What purpose, then, was this land suited for? The government offered it for pre-emption entry, and received the money for it. Presumably in so offering the land it intended it for any use to which it was suited, and not one to which it could not, in the nature of things, be adapted. There was only one possible use to which the land could be devoted, and that was to either hold it for commercial purposes or sell it to others who could do so. The only legitimate use to which it ever was or ever can be adapted is for business or residence purposes connected with a commercial port situated, as Superior is, on a great waterway.

The pre-emptors were to devote the land *to their own exclusive use or benefit. This they could only do by selling it.* Hold it they could not. The only way they could possibly get

anything out of it was to sell and convey it. The following table shows what was paid by them and what each received, and it is undisputed:

Pre-emptor.	Acres	Gov't Price.	Price Received.
Sven Larson	160	$200 00	$260 00
Gustav Johnson	145	181 25	270 00
Israel Johnson	172 88	216 10	270 00
John Johnson No. 1	160	200 00	275 00
John Johnson No. 2	161 60	202 00	290 00
Lorens Johnson	160	200 00	250 00
Martin Larson	170 75	201 00	290 00
Sven Magnusson	162 22	202 77	300 00
Peter Norrell	160	200 00	250 00
Aaron Peterson	172	215 00	275 00
Andrew Svenson	160	200 00	270 00
Andrew Wallmark	173 57	216 96	270 00
Otto Wallmark	142 78	178 47	270 00
Ole Westerland	173 59	216 98	270 00
		$2,830 53	$3,810 00

Thus, these fourteen pre-emptors received $980 more than they paid for their lands, being on the average of $70 apiece. If there was any other purpose to which this land could have been devoted, counsel in their most elaborate and able brief have failed to point it out. Assuming for the sake of argument (though not admitted) that the improvements and residence were insufficient to make valid pre-emptions as to the pre-emptors themselves, yet the evidence fails to show that Mr. Stinson knew their character; and when it most clearly appears that the pre-emptors devoted the land "to their own exclusive use or benefit" by doing the only thing possible to obtain any benefit whatever from the pre-emption, we submit that all real or substantial reason for setting aside these patents ceases to exist.

In *Myers v. Croft,* 13 Wall. 291, a pre-emptor conveyed his claim the same day he received his certificate to a person under whom defendant claimed, and two years later, after the patent issued, conveyed the same land to plaintiff, who brought eject-

ment. It was held that the pre-emption law permitted the conveyance after the issue of the certificate and before the patent, although that law expressly provides that all sales "prior to the issuing of the patent" shall be void. The court further held that the object of the pre-emption law was to prevent speculation. The policy of the government was to prevent "speculation through the instrumentality of temporary settlers." To the same effect are the following cases: *Quinby v. Conlan,* 104 U. S. 422; *Smith v. Ewing,* 23 Fed. 745; *McClung v. Steen,* 32 Fed. 374; *Gilkerson-Sloss Co. v. Forbes,* 54 Ark. 148, 15 S. W. 191; *Thurston v. Alva,* 45 Cal. 17; *Merrill v. Clark,* 103 Cal. 370, 37 Pac. 239; *Ogden v. Walters,* 12 Kan. 296; *Richards v. Snyder,* 11 Or. 509, 6 Pac. 191.

The entryman may mortgage the land, or borrow money to pay for it, before final proof: *Stewart v. Powers,* 98 Cal. 517, 33 Pac. 487; *Norris v. Heald,* 12 Mont. 284, 29 Pac. 1121; *Larson v. Weisbecker,* 1 Land Dec. 422 (Secretary Teller); *Appeal of Ray,* 6 Id. 340; *Haling v. Eddy,* 9 Id. 337; *Jones v. Tainter,* 15 Minn. 512.

Where a deed is made the same day the certificate issues the presumption is that it was made after the receipt or certificate. *Carson v. Railsback,* 3 Wash. Ter. 175, 13 Pac. 618; *Boggan v. Reid,* 1 Wash. 517, 20 Pac. 426.

For illustration, take the case of the present site of the city of Chicago. It was a marsh, an almost impenetrable swamp. The argument of counsel is that before pre-emption rights could attach the pioneers who settled here must *make their homes* in this swamp. No greater absurdity could be imagined. The pre-emption law wisely said nothing about residence or homes, and required only that the land should be devoted to the *use of the claimant,* nothing more.

Counsel further argue that the land officers did not know of the character of the improvements made upon the lands by the pre-emptors, for the reason that they lived one hundred and

fifty miles away through pathless woods. We content ourselves in answering this by saying that several of these pre-emptions were proved up eleven days after settlement, and that six of these eleven days, were occupied in traveling from Superior to Hudson, where the land office was. This left five days in which to settle, clear, cultivate and build a residence, and according to the argument of counsel, make a home. Further comment is superfluous.

There is no evidene worthy of the name in the case, showing that Mr. Stinson knew the character of these improvements, any further than he knew the character of other pre-emption improvements, which were accepted as sufficient, and he states himself that he did not know their character, and that the improvements he saw on other pre-emptions were good and substantial. The court expressly finds that the character of these improvements was known to the land office officials, and that the evidence does not show that Mr. Stinson had any knowledge of their character. (R. 497.)

We submit that the main arguments of counsel are fully met by the consideration that when the government, for the purpose of protecting the rights of settlers, and out of a tender consideration of these rights and for the prevention of speculation, and puts up swamp lands, unfit for habitation, for pre-emption entry, the policy of the law is fully and completely satisfied by having the land devoted to the exclusive use and benefit of the settler, without requiring the enormous inconsistency of compelling the settler to live in a place absolutely unfit for habitation, and the whole purpose and spirit of the pre-emption law was fully complied with, as we insist in this case, by securing to the pre-emptors the only possible benefit from their pre-emptions. Not a foot of the land in question has ever been lived on from 1854 down to the present date, so far as the record shows. What a perversion of the true spirit and purpose of the pre-emption law, to argue that it was intended to secure homes for settlers. Hun-

dreds of millions of acres of the public domain have been disposed of at private cash entry, without any application whatever of the pre-emption law. Here and there throughout the country that law has been applied for the benefit of settlers and to cut off speculation on their entries. Further than this the policy of the law has never gone.

Upon the question of *bona fide* purchase, discussed in the brief for complainants, we simply have to say that the title is in the defendant Bright as receiver. When the patent issued, the title vested in James Stinson by relation and under the covenants in his deeds and he is entitled to the property as a *bona fide* purchaser, if at that time he had no notice of any such fraud or defect as would render the title subject to be set aside at the suit of the government. The court finds that he did not know the character of the pre-emption improvement, and that he was not guilty of any fraud. There is not a syllable of testimony to show that he learned anything about the character of the improvements from the time of his original purchase to the time when the patent was executed. This sufficiently disposes, we think, of the argument of purchase for value. Mr. Stinson has, in every case, two sets of deeds, one given before, and the other after the patent was issued. The second set, however, would be unnecessary, as the covenants in the first deeds would carry title when the patent issued, and would vest in him the legal title to the lands.

A patent relates back to the inception of the title, and conveys the legal title from that time. *Starks v. Starr,* 6 Wall. 402; *Gibson v. Choteau,* 13 Wall. 92; *Shepley v. Cowan,* 91 U. S. 330; *Lessieur v. Price,* 12 How. 59; *Callahan v. Davis,* 90 Mo. 78; *Landes v. Brant,* 10 How. 372.

IV.

THE CIRCUMSTANCES OF THE CASE SHOW NO FRAUD.

There has been no speculation in the lands. James Stinson held them in his own name forty years after entry, paid great sums in taxes, and only sold them for the purpose of raising money to meet pressing necessities and pay taxes, after being tied up for seven years by injunction in suits by the government which failed for want of prosecution. (R. 38, 39.) The purpose of this conveyance is stated in the answer; that Mr. Stinson had been unable to sell the land when it would have brought high prices, by reason of the injunction; that when the suit was dismissed it was a time of great financial depression, and he was pressed for money to pay taxes and business expenses, and he conveyed the land to his son and took mortgages back in order that he might raise money by negotiating the securities. This answer was called for in the bill and is evidence for defendants. (R. 38, 39.)

No positive or direct evidence of fraud appears.

Complainants did not call three of the pre-emptors, whose testimony might easily have been taken.

Two of the pre-emptors testified positively and emphatically that there was no agreement to sell the lands prior to proof and payment.

The pre-emptors obtained the full benefit and advantage of their pre-emptions, to their own exclusive use, in the only way possible under the circumstances.

While the improvement and cultivation shown were small and unimportant, yet they were sufficient to identify each claimant with the land, and the land officers had full knowledge of the facts. They knew that the pre-emptors claimed to have settled, cultivated, improved, cleared, built houses and inhabited the

lands, all within the space of five days. The testimony conclusively shows that improvements generally throughout the same territory were rough and hastily made. The government witness Gougé, whom counsel praise as an honest man, admits to having made improvements on a claim in Minnesota by laying four logs on the ground and sleeping within the enclosure. (R. 370.) This was among the precipices of Duluth, no more fit for cultivation than the swamps of Superior. That these matters were well known to the land officers, as well as the commissioner of the general land office, abundantly appears. Counsel for the government went so far as to give evidence showing reputation as to all these early entries. Thomas A. Hendricks, then commissioner of the general land office, had his attention called, expressly in writing, to charges of fraud in two of these entries. (R. 375.) It is now sought, on testimony of reputation and rumor, to set aside patents of more than forty years' standing, on evidence purely circumstantial.

The evidence of Stinson's connection with the entries is not only weak and inconclusive, but must be taken in connection with the established fact that not one of the witnesses could understand English nor could Stinson understand their language.

Mr. Stinson was a member of the town-site company at Superior. This company was engaged in laying out the village, clearing, building roads, bridges, etc. Labor was in great demand. The Swedes were skilful woodsmen, hardy and strong, handy with the axe. The hiring of men for this work was a necessity, and it was done by Mr. Stinson, through the first John Johnson. After the men reached Superior they were under the direction and control of Wm. H. Newton. (R. 170, 171.)

Where the lands were sold they brought varying and different prices, some more, some less. There was no uniformity of price. Some $980 more than the government price was paid. This fact strongly rebuts the theory of hiring or conspiracy, since if

these pre-emptors had been hired for the purpose they would have been paid some uniform price. Nor did the profit they received tally with their work on the streets at $30 a month.

Mr. Stinson states positively that he did not know the character of the improvements on these claims. (R. 187, 188.)

There is no direct testimony that Mr. Stinson knew what the pre-emption improvements were, except the most general and vague statements of two of the witnesses to the effect that he came out into the woods where the improvements were being made. It appears that the money for the work upon the streets at Superior was paid at Taylor's Falls, not at Hudson.

It further appears that the men who worked the same length of time obtained varying and different prices for their pre-emptions, thus showing no connection between their wages for work on the streets and the disposition of their pre-emption claims.

Mr. Stinson had plenty of legitimate business at Superior by his connection with the town-site company, which was making streets and bridges. This afforded a legitimate purpose for the hiring of these men, labor being scarce.

Taylor's Falls being on the road from Superior to St. Paul, it is natural that Mr. Stinson should travel from Superior to St. Paul in company with any party which happened to be going, as traveling was difficult through the wilderness, and guides and woodmen essential.

If Mr. Stinson had had a contract with these men to pre-empt land or had hired them to pre-empt for him he would not have gone out on the land and publicly pointed out their respective claims or the location of their improvements.

He paid these men in full at Taylor's Falls for their work without knowing whether they would convey to him or not. If he had had a contract with them he would not have taken the chances.

The two witnesses most relied on by the government use the word "pre-empt," if we can believe the testimony. Is it possible that this particular word was ever used and yet the witnesses forget who was in the party?

There is nothing to show that Mr. Gibson was employed by Mr. Stinson to draw affidavits. He could not take them, because they must be made before the register.

We have thus attempted to note the substance of the testimony and some of the inferences which we think ought to be drawn from it, and we submit to the court whether it is not clear that the relief here asked should be denied. When two sets of circumstances appear, one of which is compatible with good faith and another with fraud and dishonesty, the court will presume that the former was the true theory of the parties. And this is especially true after great lapse of time, and, when, as in this case, there was no fraud upon the policy of the law, each pre-emptor having made the best and only proper use which could be made of his pre-emption.

It was no part of the contract of the pre-emptors while they were working on the streets that they should sleep in Superior. They had a perfect right to sleep on the land which they pre-empted. They were not paid for night work. Helping each other, as they testified, they had been working before hours in the morning and after working hours in the evening, spending their time on these lands.

Great stress was laid by counsel for the government upon the testimony that while the men were at work in the woods some one came out and stated that they must go down home, as the work was ended. A moment's thought will not fail to make it apparent that so far from being evidence of a contract or hiring by Stinson to take up land, it is strong evidence to the contrary, and that the real contract and only contract was to work on the streets, What was referred to by the word work?

Did it refer to work on shanties? To say that it did would lead to a manifest absurdity. How ridiculous it would be for some one to go out and tell these men who were working on the shanties that they had done the work or that the work was done on the shanties. The only reasonable interpretation is that the work to which they referred was that which they went up there to do—work on the streets. The time having arrived in that climate when such work must necessarily cease, it would be natural enough for them to be informed that such work was done.

The witness Peterson testifies that Stinson "told the boys not to let anybody else have their claims because he wanted them." Now if this testimony is entitled to any weight at all (Peterson not being able to understand English) it shows that there was no agreement or contract to dispose of the lands, but a mere request not to sell to any other person.

Counsel for complainants cite the testimony of Stuntz, the surveyor, to the effect that Stinson told him "we want to make some investments in lands there," and requesting that the survey should be made quietly.

How a survey of lands could be made "quietly" is, like most other arguments used to break down this title, left entirely to the imagination. How a surveyor walking through the woods with his assistants could do so without attracting attention is not explained in the able brief on the part of the government. But, if this forty-year-old statement is to be taken as an exact and trustworthy account, what does it come to? Nothing more than that the town-site company wanted to acquire lands; not by fraud but by legitimate purchase. Any other inference convicts Judge Nelson, Mr. Rice, Mr. Cochran and other men of high character and wide reputation, of dishonesty, meanness and fraud. And in the same connection Mr. Stuntz says that he did not know of, nor even suspect, any fraud. (R. 130.)

Counsel argue that because it was suggested to the Swedes by John Johnson that they should take out their first naturalization papers, without which they could not make pre-emptions. that preparation was being made for fraudulent pre-emptions. Not only is this not brought home in any way to Stinson, but is consistent with good faith on the part of Johnson, and only fair to the Swedes, to put them in a position where they could pre-empt lands if they so desired.

It is further argued that because a man by the name of Stanner, who was not called as a witness, asked one of the Swedes if he had a claim in Minnesota, and a man by the name of Fox, also not called, told him if he had a claim in Minnesota they didn't want him to go to Superior, Stinson must be guilty of fraud. How clear and convincing! Mr. Pickwick ordered chops with tomato sauce for dinner, and was accordingly charged and duly convicted, of trifling with the affections of Mrs. Bardell.

Counsel further cite the testimony of Lorenz Johnson that he was paid $60 for two months' work at Superior, and $10 for going to Hudson; and argue that because he was paid for the time he took to prove up, this is positive evidence of fraud. The trouble with the argument is that it is based upon false premises. This $10 was paid at Hudson, even if we accept Johnson's statement as true, and not before he went to prove up. And the record conclusively shows that Johnson got $89 from Stinson for his land. In addition to this Johnson and Stinson agree in saying that there never was any agreement to sell the land until the pre-emption right was established. (R. 100, 104, 25.)

The testimony of John Lonquist, claimed to have been one of the pre-emptors, seems to be much relied on in the brief for complainants; but it is the merest hearsay, and so weak and uncertain that it is difficult to understand why counsel attempt to

make anything of it. He says Stinson never said a word to him in all his life, but Stinson talked with a pre-emptor called Ogren, and Ogren told witness that he wanted him to pre-empt land for him. Ogren was also a Swede, and could not understand English any more than Lonquist could. For some reason, it is also insisted by counsel, that Lonquist was one of the pre-emptors, under the name of the second John Johnson, although he does not say that he ever went by that name, and positively asserts that he never entered any land that he knows of or sold any land to Stinson. The trial court, upon the hearing, in the decree found that it did not clearly appear whether Lonquist was a pre-emptor; and that the testimony in support of the bill was of an extremely doubtful, contradictory and uncertain character, several of the witnesses having given contradictory statements, and two or three of them not having been sworn at all, and several being dead. (R. 496.)

The testimony of Gustav Johnson relates to an alleged admission of Stinson made some forty years before the testimony was given. Even if literally true the statement is entirely innocent. Supppose Stinson did agree with John Johnson, for his services in hiring the Swedes to work on the Superior streets, to give him as much land in Minnesota as Johnson had pre-empted in Wisconsin, what of it? But no dependence whatever can be placed upon testimony of language used so long before. The change of a single word might alter the meaning of the whole admission.

The argument in appellants' brief, as to the testimony of Peter Norrell, is equally far-fetched and purely speculative. Peter Norrell stated with the greatest emphasis that he made his pre-emption for his own use, and had no agreement with Stinson or any other person in respect to it. (R. 246.) But an expression of Norrell, who used the English language with considerable difficulty, is seized upon, to build up a conclusion of

fraud. He says two of his associates came to him in the woods, after he had made his settlement, and said "we had to go *down,*" to "go *home,* leave the place and go *home.*" "The work is done." (R. 261, 262.) It is said that this means they had gone through the form of making claims, and the job being complete it was time for them to return home. Now this is very ingenious, and shows that counsel have been thorough and close in their study of the case. But it will at once occur to the court that forty-year-old evidence of the exact language used, in a foreign tongue, by ignorant men, repeated by a witness who uses the English language with difficulty, is a pretty slim basis upon which to rest a decree avoiding patents which have stood nearly half a century. If there was any direct or positive evidence of fraud such slight circumstances might possibly tend to give some color to the other evidence, and confirm the court in its opinion; but where *all* the direct evidence is the other way, as in this case, surely such testimony is too uncertain to be of any, even the slightest, weight. And, as we have already seen, the word work naturally referred to the work on the streets. It was late in the fall, and the street work, in that climate, would naturally be about over. Even if the exact language be taken as clearly proven still the inference to be drawn is not clear or direct, but merely speculative.

It is further argued that Norrell's testimony, in favor of defendants, is not to be believed, because he was induced by Streeter (the gentleman who worked up these government suits) to make an affidavit in favor of the complainants. If this argument be sound what shall be said of the testimony of Lorenz Johnson, a government witness, whose testimony was taken in another case, and is wholly contradictory of his testimony here, so far as it goes? Is this the clear, convincing testimony required by the court in this class of cases? Is this the evidence equivalent to the testimony of two witnesses required to over-

come the sworn answer, and the clear and explicit denial of defendant James Stinson in his testimony?

It is respectfully submitted that the judgment of the court of appeals should be affirmed and the bill dismissed.

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